Supreme Court, U.S.
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No. 94-598

In The

Supreme Court of the United States

October Term, 1994

JANET ROACH,

Petitioner,

v.

BEAUFORT COUNTY SCHOOLS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of North Carolina

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the North Carolina Court of Appeals erred in finding in the particular circumstances of this case that the Beaufort County Schools had not failed to provide a free appropriate education to petitioner's child.

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On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of North Carolina

BRIEF IN OPPOSITION

The Beaufort County Schools respectfully submits a brief in opposition to the petition for certiorari to review the decision of the Supreme Court of North Carolina filed by Janet Roach.

OPINIONS BELOW

The Supreme Court of North Carolina entered its Order on June 23, 1994, denying petitioner's Petition for Discretionary Review of the decision of the Court of Appeals of North Carolina reported at 443 S.E.2d 339 (N.C. Ct. App. 1994).

JURISDICTION

The Supreme Court entered its Order on June 23, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The Individuals with Disabilities Act, 20 U.S.C. § 1400, *et seq.*

STATEMENT OF THE CASE

This case was filed by petitioner, Janet Roach, September 26, 1989 in the Office of Administrative Hearings pursuant to North Carolina's Administrative Procedures Act, N.C. Gen. Stat. § 150B-23, alleging that respondent, Beaufort County Schools, had failed to provide a free appropriate public education for petitioner's daughter. A hearing was held and the Administrative Law Judge issued a Recommended Decision to the State Board of Eduction in petitioner's favor.

Based on the record of the Administrative Hearing, the North Carolina State Board of Education adopted in full the Administrative Law Judge's Findings of Fact and Conclusions of Law as contained in his Recommended Decision and ruled that respondent must provide petitioner's daughter with an appropriate education and must reimburse petitioner for reasonable private placement costs from February 22, 1989 until the school system provided an appropriate education.

Pursuant to the North Carolina Administrative Procedures Act, respondent filed a Petition for Judicial Review in the Beaufort County Superior Court and the court reversed the decision of the State Board of Education.

Petitioner gave notice of appeal to the North Carolina Court of Appeals which filed an opinion vacating and remanding the trial court's decision on February 15, 1994. However, on February 16, 1994, respondent's attorney wrote a letter to the court of appeals pointing out that it had relied upon a statute enacted subsequent to the filing of that action in rendering its decision. The court of appeals thereafter entered an order withdrawing this opinion on February 18, 1994.

On April 19, 1994, the court of appeals issued a new opinion holding that respondent had violated the IDEA in failing to fully develop an Individualized Education Program ("IEP") but that respondent had not failed to provide a free appropriate education for petitioner's daughter.

Petitioner filed for discretionary review to the Supreme Court of North Carolina on the ground, *inter alia*, that the court of appeals had erroneously concluded that failure to fully develop an IEP does not necessarily constitute failure to provide a free appropriate public education. The Supreme Court denied petitioner's petition.

In brief, the facts of the case are as follows: Petitioner's daughter, Ginger Goforth, is a Behaviorally Emotionally Handicapped (BEH) child. In August of 1987, Ginger was enrolled in the Beaufort County Schools

("BCS") system at Bath High School and placed in a self-contained BEH class. In October of 1987, following a violent episode, petitioner committed Ginger to Brynn Marr Hospital with the help of the Tideland Mental Health Center. On December 9, 1987, Ginger was moved directly from Brynn Marr to The Whitaker School, a school in Granville County for children who exhibit behavior that could be considered dangerous to themselves or others. In late 1988, The Whitaker School determined that Ginger's discharge was necessary because Ginger could be served in a less restrictive environment. A community planning conference to discuss Ginger's release from Whitaker was held on January 5, 1989.

The principal of Bath High School and the Program Administrator for Exceptional Children Programs of BCS, Rosa Beamon, both attended this meeting. The principal and Ms. Beamon expressed their opinion that because of Ginger's previous violent behavior at Bath High School in 1987, homebound instruction might be appropriate. A teacher and a unit supervisor of The Whitaker School expressed their opinions, however, that a self-contained BEH class or day treatment, with group placement as a back-up, would be a less restrictive way to meet Ginger's needs.

On February 22, 1989, The Whitaker School discharged Ginger, and she returned to Beaufort County. On March 1, 1989, Rosa Beamon mailed out notices of a meeting of the School Based Committee to be held March 6, 1989, for the purpose of planning Ginger's placement. Although informed of this meeting, petitioner chose not to attend. No IEP was developed for Ginger at this meeting although several placement options were discussed.

On March 27, 1989, the School Based Committee held another meeting. The petitioner appeared at this meeting along with a representative from The Governor's Advocacy Council, and petitioner was advised that a teacher assistant had been employed by Beaufort County Schools to work with Ginger on her return to Bath High School in a BEH self-contained classroom setting. Petitioner stated that she did not want Ginger at home but did not refuse this proposed placement. Also at this meeting, BCS began preparing an IEP for Ginger.

Respondent notes that petitioner's statement of the case incorrectly asserts that at the meeting on March 27, 1989 the Beaufort County Schools "did not retract their placement decision." (Petition for Certiorari at 6). The court of appeals and the Administrative Law Judge both specifically found that Beaufort County Schools had offered petitioner a self-contained classroom setting at that meeting.

During this process, on April 10, 1989, without giving prior notice to BCS or specifically challenging any part of the developing IEP, petitioner placed Ginger in NOVA, a private residential treatment center in Lenoir County. At NOVA, Ginger's teacher was provided by the Lenoir County Schools. BCS did not thereafter complete the IEP.

Funding by Tideland Mental Health Center for Ginger to attend NOVA was to run through September 1989, and on August 15, 1989, the Tideland Mental Health Center called a meeting to discuss the fact that funding for Ginger's placement at NOVA was ending. Rosa Beamon and Dan Winslow, School Psychologist for BCS, attended this meeting. At the meeting, Beamon stated

that BCS was prepared to provide a resource or full-time BEH placement depending on Ginger's need and a full-time teacher assistant at Northside High School.

After this meeting the petitioner filed a petition for a contested case hearing. Ginger remained at NOVA until May of 1990, at which time she withdrew. Since that time petitioner has not requested educational services from BCS.

REASONS FOR DENYING THE WRIT

The Decision Below Does Not Conflict With Any Decisions of This Court And There is No Conflict Among the Circuit Courts of Appeal on This Issue; Therefore, The Court Should Deny Petitioner's Writ.

In filing this petition, petitioner seeks review of a narrow decision by a state court. The North Carolina Court of Appeals found, based on the specific facts of this case, that the respondent school board had violated the procedural regulations of the IDEA but that the violation did not amount to a denial of a free appropriate education. Specifically, the court concluded that respondent had violated the IDEA when it failed to complete the IEP development process even though petitioner unilaterally and without notice placed her daughter in a private residential treatment facility in another county where educational services were provided by the local public school system. The court further held that this procedural error did not result in a denial of a free appropriate education, rather petitioner's act of placing her daughter in another

school system was the actual cause for respondent's failure to provide services.

Petitioner asserts that this decision of the North Carolina Court of Appeals conflicts with precedent from this Court, notably *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), *Board of Education v. Rowley*, 458 U.S. 176 (1982) and *Florence County School District Four v. Carter*, ___ U.S. ___, 114 S. Ct. 361 (1993). A comparison of the cases shows that this is far from true. To the contrary, the challenged decision is consistent with this Court's precedent as well as established federal case law.

Petitioner's primary claim is that the failure of respondent to complete the IEP is, in itself, a *per se* failure to provide a free appropriate education. Petitioner misinterprets the decisions of this Court in asserting that any procedural violation of the regulations regardless of surrounding circumstances amounts to a denial of a free appropriate education. No such precedent exists. In fact, lower federal courts uniformly have rejected this strict liability analysis.

In this case, the court of appeals followed the practice of numerous federal courts by considering the effect and magnitude of the procedural violation in deciding whether there was a denial of a free appropriate education. Specifically, the court found that the respondent "was following the correct procedure to provide Ginger with a free appropriate education upon her release from Whitaker School." *Beaufort County Schools v. Roach*, 443 S.E.2d 339, ___, App. of Petition for Cert. at 19a (N.C. Ct. App. 1994). Based on a current IEP from the Whitaker

School, the respondent offered a self-contained BEH classroom with a one-on-one aide and began developing its own IEP. The court of appeals found that the process for providing Ginger with a free appropriate education was, however, interrupted by petitioner when she, without notice and without disagreeing with the proposed placement, unilaterally placed Ginger in a private residential placement facility.

In holding that this interruption in the process did not amount to a failure to provide a free appropriate education, the court of appeals was simply acknowledging what other courts consistently have held: that the inquiry into whether a free appropriate education has been offered is fact specific and is not automatically determined upon a finding of a procedural violation. Federal courts have established a prejudice test which provides that only "procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process" result in a denial of a free appropriate education. *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1484 (9th Cir. 1992). See also, *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990) (holding that a procedural violation involving a failure to meet time limits on notification of parent rights and IEP development did not constitute a failure to provide a free appropriate education); *Roland v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990) (holding that a procedural violation is not a *per se* indication of failure to provide a free and appropriate education or an appropriate IEP; instead "there must be some rational basis to

believe that procedural inadequacies compromised the pupil's right to an appropriate education . . . ").

Admittedly, in some cases a procedural default will constitute a failure to provide a free appropriate education sufficient to require reimbursement. This was the case in *Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985) on which petitioner heavily relies. In *Hall* the school consistently failed to inform parents of their rights which resulted in a loss of educational opportunity for their son and effectively prevented them from meaningful participation in the IEP development process. By contrast, in the present case the court of appeals found that respondent was following the correct procedures to provide petitioner's daughter with an appropriate education until the time petitioner interrupted the process. Aside from its failure to complete the development of the IEP, the respondent met all procedural requirements of the law. In addition the record clearly shows that petitioner was fully involved in the IEP process along with her parent advocate and there was no showing that her daughter lost educational opportunity due to the respondent's procedural error. Rather, petitioner's daughter received educational services under an IEP through the Lenoir County Schools while a resident at NOVA.

Even if petitioner's assertion were correct (that a failure to adhere to the procedural requirements of the IDEA is equivalent to the denial of a free appropriate education), petitioner is still not entitled to reimbursement. This Court has established a two-part test that a parent must meet in order to qualify for reimbursement. Petitioner has unequivocally failed to meet these requirements. In *Burlington* this Court held that a reviewing

court must find that the private placement chosen by the parent was appropriate under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., and that the educational program offered by the school was not proper under the IDEA. 471 U.S. at 370.

Petitioner never made a showing, nor did the court of appeals find, that the placement of her daughter at NOVA was appropriate. In petitioner's own testimony to the Administrative Law Judge she admits to placing her daughter at NOVA because she was worried about being held financially accountable in the event her daughter had a violent episode in respondent's offered placement. She also admits that she did not refuse the school system's placement on the grounds that she felt it was unacceptable under the IDEA. Nor did she argue to the court of appeals that the program being developed was inappropriate. She relied solely on the argument that the respondent's procedural omission constituted a denial of an appropriate education. Clearly, petitioner's reliance on *Burlington* is misplaced.

Similarly the *Carter* decision does not resolve the issues presented by this case. In *Carter* this Court noted that the two *Burlington* requirements were already settled: "1) the school district's proposed IEP was inappropriate under the IDEA, and 2) . . . Trident . . . provided an education otherwise proper under the IDEA." *Carter*, 114 S. Ct. at 365. The narrow holding of *Carter* is only that "a parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement." *Id.* at 366. In this case there has been no claim made that NOVA was "unapproved." In fact, there have been no findings at all

about the appropriateness of the placement at NOVA or the appropriateness of respondent's offered services. Essentially, petitioner is requesting relief that would run directly contrary to these established precedents. Without meeting the *Burlington* standards petitioner is conclusively not entitled to reimbursement.

To the extent that *Burlington* and *Carter* have any application to the present case, they support the court of appeals' authority to determine the legal consequence of respondent's procedural violation. This Court has stated that once a court determines that the IDEA has been violated, "it is authorized to 'grant such relief as the court determines appropriate.' " *Burlington*, 471 U.S. at 373-374 (citing 20 U.S.C. § 1415(e)(2)). Under the IDEA "equitable considerations are relevant in fashioning relief and the court enjoys broad discretion in so doing." *Carter*, 114 S. Ct. at 366 (citations omitted). In this case, the court weighed most heavily the fact that the petitioner was the root of the school's failure to provide educational services. Equitable considerations dictated that reimbursement was not proper. In reaching its decision, the court properly exercised the discretion that this Court has consistently recognized.

Federal courts have exercised discretion in a similar fashion in making awards of damages and reimbursement. For example, in *Jackson v. Franklin County School Bd.*, 806 F.2d 623 (5th Cir. 1986), the court considered the amount of harm caused by procedural violations in determining the appropriate relief. The court held, "if it is determined the parent would have pursued the same course of action in the absence of any procedural violations, then only nominal damages are appropriate." The

evidence in this case suggests that the parent did not reject the IEP being developed by respondent but placed her daughter at NOVA out of fear of potential liability if her daughter caused personal or property damage. Consistent with this evidence a court could find that the parent would have pursued a placement at NOVA regardless of the school system's procedural violation and, following the *Jackson* reasoning, deny reimbursement on this basis.

In her petition, the petitioner concludes by urging this Court to grant certiorari in order to prevent other state courts from reaching a similar decision. As respondent has already stated, this case turns on its individual facts. Those facts were properly analyzed by the court of appeals and in its discretion it ruled that reimbursement was not justified. The chances of a similar case arising in North Carolina or in any other state are merely speculative. They are certainly too uncertain to require this Court to consider the issue at this time. In the unlikely event that a trend of conflicting decisions arises in the lower courts, at that point the Court could examine the issues and consider review.

In summary, the Court should reject petitioner's appeal. The decision below is not in conflict with this Court's precedent, is consistent with existing case law and does not raise an issue of sufficient significance to merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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